Supreme Court, U.S.
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No. 98-1704

In The

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

ROBERT H. TICE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the court below correctly determine that an employee is entitled to his own day in court under the Age Discrimination in Employment Act, when:

1. other entirely unrelated employees sued the same employer unsuccessfully 16 years previously in a case raising a similar issue involving job transfer and mandatory retirement; and

2. the Equal Employment Opportunity Commission sued the employer previously on behalf of job applicants in cases raising a different issue involving hiring age limitations?

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STATEMENT OF THE CASE

A. Factual Background

Robert H. Tice and eleven airline pilot colleagues brought this age discrimination action in 1995 against the petitioner, American Airlines, Inc., after the company refused to allow them to "downbid" to the cockpit position of flight engineer (called "flight officer") and forced them to retire following their sixtieth birthdays. The plaintiffs wanted to continue their employment after age 60 as flight engineers, which is permitted by the Federal Aviation Administration and by all domestic airlines except American. *See Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 422-23 (1985) (age 60 is not a bona fide occupational qualification ("BFOQ") for flight engineers).

American filed its answer asserting, among other things, that this action was precluded under the doctrines of res judicata and/or collateral estoppel based on the decisions in *Johnson, et al. v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); and *EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995).

The *Johnson* litigation was filed in 1979 and 1980 by a group of airline pilots (not including the plaintiffs here) who sought to continue their employment past age 60. *Johnson* was not a class action, and all plaintiffs filed their written consents to join the litigation. At that time, petitioner opposed the joinder of plaintiffs under age 60 on the ground that they "lack standing" and that their potential claims would not be affected by a judgment. *Johnson v. American Airlines, Inc.*, 531 F. Supp. 957, 964

(N.D. Texas 1982). The *Johnson* court found sufficient evidence to support a jury verdict that age (60) was a BFOQ for flight engineers "reasonably necessary to the normal operation" of the petitioner's business. 29 U.S.C. § 623(f)(1). *Johnson*, 745 F.2d at 994.

Contrary to petitioner's representation, *Murnane* and *EEOC* involved different plaintiffs and a different issue entirely. Edward Murnane applied for a pilot job and was rejected because of his age (43) pursuant to American's policy not to hire pilots over age 40. The Equal Employment Opportunity Commission ("EEOC") (successor to the U.S. Department of Labor) intervened as a plaintiff, and the court upheld petitioner's "age forty [hiring age] guideline." *Murnane*, 667 F.2d at 101. Later, the EEOC brought a second action challenging petitioner's hiring age limit, but the court concluded that the case was collaterally estopped by *Murnane*. *EEOC*, 48 F.3d at 166-172. The Tice plaintiffs were not parties and did not participate in *Johnson*, *Murnane*, or *EEOC*.

B. The Trial Court's Decision

The trial court dismissed the complaint based on the view that the *Johnson* plaintiffs "virtually represented" the plaintiffs here when the earlier group litigated their claims in 1979. Pet. App. 35a. At the same time, the trial court rejected American's argument that *Murnane* and *EEOC* had preclusive effect, determining that the plaintiffs in those cases were "pilots over age 40 who applied for and were denied employment," whereas the plaintiffs here are "former American pilots over sixty who wished

to downbid to the position. . . . " This distinction is "significant," the court determined. Pet. App. 33a, n.9.

C. The Court Of Appeals' Decision

The Court of Appeals reversed. It concluded that, as the EEOC pointed out in its amicus brief, the rights plaintiffs seek to vindicate are individual, not group-based. The Age Discrimination in Employment Act ("ADEA") provides that "[n]o employee shall be a party plaintiff to any . . . action [under it] unless he gives his consent in writing. . . . " 29 U.S.C. § 216(b) (section 16(b) of the Fair Labor Standards Act ("FLSA"), incorporated into the ADEA by 29 U.S.C. § 626(b)). The Tice plaintiffs never gave their "consent in writing" to join any of the earlier cases upon which American relied. The court observed that ADEA group actions like *Johnson* are "opt-in" rather than "opt-out," as a result of the FLSA's "consent in writing" requirement, and thus they differ importantly from the class actions available under Rule 23. The additional protections of this system, compared to Rule 23 "opt-out" class actions, would be eviscerated were the Tice plaintiffs to be viewed as having been in privity with the earlier plaintiffs. Pet. App. 15a.

In addition, the court concluded that there were "too many" differences between the plaintiffs here and those in the earlier cases to make preclusion appropriate. Pet. App. 15a. There was no evidence of any relationship between the *Johnson* and Tice plaintiffs. On the contrary, the interests of the *Johnson* plaintiffs in 1979 diverged from the interests of younger American employees (including the Tice plaintiffs, then in their early 40s),

"since the younger pilots might well have wanted their elders forced out [at age 60], freeing up more positions for themselves." *Id.*

The court found no evidence of manipulative litigation practices, and it specifically rejected petitioner's suggestion that the plaintiffs' decision to retain one of the same attorneys as in *Johnson* amounted to an improper practice. Pet. App. 15a-16a. The court noted that the plaintiffs did not and could not have taken part in any of the earlier challenges to petitioner's age limitation policies, nor did they acquiesce to being represented indirectly by those plaintiffs.

The Seventh Circuit emphasized this Court's continuing solicitude for each person's right to pursue his or her own case, citing *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996), and concluded that to bar this action would "strain preclusion principles." Pet. App. 16a. Finally, the court concluded, in agreement with the district court, that the EEOC did not serve as the Tice plaintiffs' representative in *Murnane* and *EEOC, supra*. The EEOC participated in *Murnane* to enforce Murnane's individual rights, and it filed the later case to enforce the rights of 57 specifically named applicants for employment, none of whom is a plaintiff here. *See* 29 U.S.C. § 626(c)(1). The EEOC could not have represented the interests of the Tice plaintiffs "because the class of persons complaining that they were not hired because of American's age policies is inherently different from the class of existing employees" complaining about mandatory retirement. "What helps the one may directly hurt the other." Pet. App. 15a. EEOC's status as a public body did not change the court's analyses under the rubric of

virtual representation or privity, and the court noted that in *Richards* this Court had rejected a similar argument. Pet. App. 16a-17a.

REASONS TO DENY THE WRIT

The petition seeks this Court's review of the Seventh Circuit's judgment that this case may proceed because plaintiffs were not "virtually represented" in prior litigation. The statute under which this case arose bars preclusion because plaintiffs cannot be represented by others without the plaintiffs' written consent. Moreover, the Seventh Circuit's determination that "virtual representation" does not apply to bar plaintiffs' claims is based on the unique facts of this case, including the fact that plaintiffs were complete strangers to the earlier litigation. Pet. App. 16a. Review should also be denied of the determination that this case is not precluded by EEOC actions involving fundamentally different issues brought on behalf of different employees.

There is no conflict between the decision below and the decision of any Court of Appeals. Despite petitioner's mischaracterization of the issues, the facts, the decision below, and decisions from other circuits, the court below correctly analyzed the material facts and the applicable law. Under this Court's decision in *Richards*, plaintiffs are entitled to their day in court.

1. The Decision Below Is Consistent With The Statutes Under Which This Action Was Filed.

There is no decision of any court arising under the ADEA or FLSA that is in conflict with the decision below. The Seventh Circuit correctly interpreted and applied the provisions of the ADEA, and petitioner does not challenge or even address the court's dispositive determination under the statute. 29 U.S.C. § 216(b).

Contrary to petitioner's argument that the opinion below is in conflict with the law in other circuits, the decision rejecting the application of virtual representation turned on the unique facts in this litigation, including the statutory framework and the absence of any relationship between the plaintiffs here and those in prior cases. The ADEA's special statutory provisions foreclose petitioner's proposed expansive application of virtual representation. Under the ADEA, a party who wishes to participate as a plaintiff in litigation must file a "written consent" to do so. 29 U.S.C. § 216(b). Those who do not "consent" may not participate in or be bound by the judgment. *LaChappelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287-88, 289 (5th Cir. 1975) (no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class by filing his written consent). Therefore, under the language of the statute itself, the plaintiffs here could not be bound or precluded by *Johnson*, *Murnane*, or *EEOC*. This is so because the plaintiffs here did not consent to join those cases and the EEOC did not file suit "to enforce the right" of any of the Tice plaintiffs. 29 U.S.C. § 626(c)(1). This Court should not grant review because

the court below correctly interpreted the controlling statutes, and because no other court has decided the issues differently.

2. The Law In The Seventh Circuit Is Not In Conflict With Other Circuits.

Contrary to petitioner's claim that the Seventh Circuit takes a "highly restrictive view of privity and virtual representation" (Pet. 10), six days after the decision below, the court applied virtual representation in *Monfils v. Taylor*, 165 F.3d 511 (1998). The court determined that the application of the doctrine was appropriate because the plaintiff had actively litigated his personal defenses in a prior case. *Id.* at 519-21. The *Monfils* court distinguished the decision in *Tice* as involving "different parties in a completely different case," whereas in *Monfils* there was a pre-existing relationship between the prior and current litigants such that their "interests were in privity." *Id.* at 521.

In support of its claim that the decision below is in conflict with the law of other courts, American relies principally on *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996). *Tyus* was a voting rights case, so it did not involve the ADEA's special statutory "opt-in" scheme. Moreover, *Tyus* involved the issue whether collateral estoppel applied to bar an action in which aldermen plaintiffs had previously sued and lost, and then joined with others to file another identical case. In holding that the new plaintiffs were in privity with the aldermen, the court was influenced by several factors, none of which is present here: First, there was a "special relationship" between the

plaintiffs, several of whom had already once litigated the case. Stretching to find such a relationship here, petitioner argues that the plaintiffs are members of the same union as the *Johnson* plaintiffs, but there was no record here or in *Johnson* as to union membership status. Moreover, there is no authority to support the proposition that an action by individual employees on their own behalf bars a later plaintiff's claim simply because he is a member of the same union. As the court below found, *Johnson* was filed sixteen years before this case and "there are too many differences between the Tice plaintiffs and the plaintiffs in the earlier cases to make preclusion appropriate." Pet. App. 15a. For one thing, in 1979 the plaintiffs here may well have been hostile to Johnson's claims. *Id.* Thus, the "special relationship" between the *Tyus* plaintiffs and those in the case which preceded it did not exist in this case. As the *Tyus* court concluded in language applicable here, where "the two parties are strangers to each other, then virtual representation would not be appropriate." 93 F.3d at 455.

Second, the *Tyus* court determined that there had been blatant tactical maneuvering to avoid the force of the prior decision when the original plaintiffs sought to withdraw from the first case and then join with nonparties to file a second action. *Id.* at 457. No such factors are present here. In fact, when the *Johnson* plaintiffs were assembled pursuant to a court-approved notice in the early 1980s, the Tice plaintiffs did not receive notice and were among those who were barred from participation because their sixtieth birthdays were after December 31, 1984, the cut-off date established by the court. *Johnson*, 531 F. Supp. at 964-65. At that time, petitioner asserted

that pilots under age 60 "lack standing" because they had not yet been forced to retire and thus their potential claims would not be affected by a judgment in *Johnson*. *Id.*

Third, the *Tyus* court determined that virtual representation was "particularly appropriate for public law issues," and that any due process concerns were lessened in a case in which plaintiffs seek to vindicate only public rights. 93 F.3d at 456. Unlike the *Johnson* plaintiffs, who sued for personal damages and to regain their employment, the *Tyus* plaintiffs and those in the earlier action raised no issues involving individual rights. *Id.* If the *Johnson* plaintiffs had prevailed, the court would have ordered individual damages and may or may not have entered a remedial order ultimately benefiting other pilots. In *Tyus*, the plaintiffs did not allege that they had a different private right not shared in common with the public. *Id.* at 457.

The other cases cited by American are also inapposite. In *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 720 (5th Cir.), *reh. denied*, 514 F.2d 1072, *cert. denied*, 423 U.S. 908 (1975) (Pet. 9, 18), a county was precluded by a prior action because it had a "class relationship to the parties." *But see Eubanks v. Federal Deposit Insurance Corp.*, 977 F.2d 166, 170 (5th Cir. 1992), in which the Fifth Circuit later concluded that parallel interests with a prior litigant are insufficient to invoke the doctrine of "virtual representation." Even where there is an "identity of claims," the court held res judicata does not bar a second action unless plaintiff could or should have brought its claim in the prior case. *Id.* at 173. *See also Chase Manhattan N.A. v. Celotex Corp.*, 56 F.3d 343 (2d Cir. 1995) (Pet. 13) (virtual representation did not apply because prior litigant's

incentives were not the same); *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 750 F.2d 731, 745 (9th Cir. 1984), *cert. denied*, 474 U.S. 919 (1985) (Pet. 22) (plaintiffs denied opportunity to relitigate consistent with California law since they had a previous opportunity to participate but elected against it); *NAACP v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990) (Pet. 13) (prior litigant who joined with NAACP to file a second case challenging flying of confederate flag barred by res judicata because he was "so closely aligned with NAACP's interests" in the original suit).

3. The Decision Below Is Consistent With This Court's Decision In *Richards*.

Petitioner fails to come to terms with the fact that the decision below is wholly consistent with, and arguably compelled by, this Court's decision in *Richards*. The Court rejected as a violation of due process the state's argument that prior litigants had provided "adequate representation." 517 U.S. at 796. The *Richards* plaintiffs were not parties to the earlier case and had not received notice that a suit was pending that would conclusively resolve their legal rights. Nor was the earlier suit brought on behalf of a class that included the later plaintiffs. As this Court noted, a litigant is not bound in a litigation in which he is not a party. A judgment among parties to a lawsuit "resolves issues as among them, but it does not conclude the right of strangers to these proceedings." 517 U.S. at 798. This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

This Court recently reaffirmed the principles of *Richards* in *South Central Bell Telephone Co. v. Alabama*, ___ U.S. ___, 119 S. Ct. 1180 (1999). The Court observed, in language equally applicable here, that the previous litigants had not sued on behalf of a class, that they did not understand their case to be on behalf of others, that the judgment they received did not purport to bind nonparties, and that the Court made no special effort to protect the interests of non-litigants. In *South Central Bell*, the earlier case involved different plaintiffs and different tax years. Neither case was a "class action," and defendant made no claim that there was "privity" or some other "special relationship" between the two sets of plaintiffs. Like the Tice plaintiffs, the plaintiffs in *South Central Bell* were "strangers" to the earlier case and therefore could not be bound by the earlier judgment. *Id.* at 1185.

The facts here are even stronger for rejecting preclusion than the facts in *South Central Bell* since, unlike here, the plaintiffs in *South Central Bell* were aware of the earlier litigation. The Court rejected the argument that prior "notice," plus the same lawyer in both cases, were sufficient to meet due process requirements. These circumstances "created no special representational relationship" between the two sets of plaintiffs. *Id.* The Seventh Circuit's decision below is totally consistent with this Court's decisions in *Richards* and *South Central Bell*.

4. The Government Did Not Represent The Tice Plaintiffs' Interests In *Murnane* And *EEOC*.

Petitioner argues that this case is barred by the EEOC's involvement in *Murnane* and *EEOC*, and that the circuits disagree as to the preclusive effect of a decision against a public entity. In fact, there is no case arising under the ADEA or FLSA which is in conflict with the decision below. Like petitioner's earlier argument about the preclusive effect of *Johnson*, the claim that this case is barred by prior EEOC litigation about petitioner's hiring age limitation is foreclosed by both the substantially different facts involved and the language of the statute itself.

Murnane and *EEOC* involved different parties, different issues, and different facts. The issue in *Murnane* was whether American's age-below-40 hiring policy was a bona fide occupational qualification. The issue in *EEOC* was whether *Murnane* precluded the EEOC's later action under the doctrine of collateral estoppel. Plaintiffs in those cases had no need or occasion to present the evidence and arguments the plaintiffs here would present. The safety of an experienced pilot with impeccable qualifications to downbid and continue his employment as a flight engineer after age 60 is a considerably different issue from one involving the safety of relatively inexperienced new-hire applicants over age 40.

Like petitioner's arguments for preclusion in reliance on *Johnson*, its position is again defeated by the statute. The ADEA provides that an action brought by an employee "shall terminate upon the commencement of an action by the [EEOC] *to enforce the right of such employee*

under this chapter." 29 U.S.C. § 626(c)(1) (emphasis added). Under the FLSA, an employee's right to bring an action terminates upon the filing of an action by the government to obtain unpaid wages "owing to such employee." 29 U.S.C. § 216(b). As explained in *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 494-95 (3d Cir. 1990), the EEOC "serve[s] as the individual's representative when it seeks to enforce that individual's rights." An EEOC action seeking only injunctive relief does not "foreclose injured employees from joining an ongoing lawsuit which sought relief that the EEOC chose not to pursue." *American Ass'n of Retired Persons v. Farmers Group*, 943 F.2d 996, 1006 (9th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992).

As the court noted below, in *Murnane* the EEOC sought relief only for Mr. Murnane, and in *EEOC* the government specifically named 57 pilot applicants – "only those applicants who could not become captain under the years-to-Captain rule" – as the persons whose rights it was seeking to enforce. *EEOC*, 48 F.3d at 169, and n.7. The government made no mention of, and sought no relief for, any of the Tice plaintiffs in those cases.

The EEOC's actions in *Murnane* and *EEOC* challenged a different age limitation on behalf of different persons. Petitioner cites no decision of any court holding that an EEOC action on behalf of different persons and on a different issue can bar a later individual action.

Petitioner cites *In re Schimmels*, 127 F.3d 875 (9th Cir. 1997) (Pet. 13, 17), in support of its claim that the Seventh Circuit's rejection of petitioner's collateral estoppel argument is in conflict with decisions in other circuits. The *Schimmels* court held that a judgment against *qui tam*

relators in an action under the False Claims Act ("FCA") had full res judicata effect against the government. *Id.* at 879. The *Schimmels* court was influenced by these facts: (1) relator asserted that he represented the United States under the FCA, which requires notice to the government, provides that the action be brought in the name of the government, and authorizes the government to assume control of the litigation (*id.* at 879-80, n.13); (2) under the FCA, an action may be brought by a private party only with authorization of the responsible public authority; (3) the government admitted that it was in privity with the relators for some purposes; (4) the government was aware of the relators' case and even tacitly participated in it but never sought to intervene; and (5) in a *qui tam* action, the government is the "real party in interest," even when it permits a *qui tam* relator to pursue the action on its behalf. *Id.* at 883-85.

In conclusion, the court found that the private right of recovery created by the FCA exists not to compensate the relator, but the United States. *Id.* at 883. It held that the relator and the government were in privity and that the dismissal of relator's claim had preclusive effect on the government. *Id.* at 883, 885. The decision in *In re Schimmels* is not even remotely in conflict with the decision below.

The other cases cited by petitioner are similarly inapposite. In *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980) (Pet. 12, 17, 18), the court determined that the government was bound by a prior case prosecuted by a state agency because the state's authority was derived from federal law and revocable by a federal agency. Since there was a legal relationship between the two agency

"partners," a judgment against the state had preclusive effect against the federal government. *Id.* at 1001-4. The court emphasized that the state agency was accountable to the United States, and that both acted to "enforce the same permit." *Id.* at 1003. Under these circumstances, the two were in privity because the state had the authority to represent the interests of the United States. *See also Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952) (Pet. 16) (municipality's authority to establish fares is binding on the public). These decisions are not inconsistent with the decision below.

5. Petitioner's Remaining Arguments Are Meritless.

Petitioner argues that once an employee protests forced retirement at age 60, no other employee should ever be permitted to do so, and that the 1979 *Johnson* action bars all pilots in perpetuity – even those not yet hired – from challenging their own forced retirement. If that were to be the law, employees like Robert Tice, who had no opportunity to participate in 1979, never would have the opportunity to prove that the "safety" rationale petitioner advanced twenty years ago has no continuing validity due to recent industry experience, scientific and medical advances, and the many new facts which have come to light that totally undercut the policy's stated rationale. Plaintiffs must be allowed their own day in court.

Having demonstrated no conflict with the decision of any other court of appeals or with any decision of this Court, and having presented no compelling issue that needs resolution by this Court, petitioner resorts to

hyperbole to convince the Court to grant review. For example, petitioner argues that it could be "forced by economics" to abandon its policy because it might be "too burdensome to defend." Pet. 22-23. Petitioner argues that a virtually unlimited supply of plaintiffs might "fence sit," but it does not suggest that plaintiffs did so here. Petitioner asserts – in an argument so baseless that it was never advanced in the courts below – that "plaintiffs, and their counsel, chose to litigate in Illinois because their claim could not survive motions to dismiss in Texas or in the District of Columbia." Pet. 24. In fact, the only "forum shopping" in this case was petitioner's repeated unsuccessful attempts to transfer the case to its headquarters district in Texas.

Petitioner claims that the decision below will cause this litigation to have "an endless life" in a "war of attrition" in which plaintiffs will employ a "strategy aimed at exacting settlements." Pet. 22. What petitioner is really complaining about are the FLSA statutory provisions which were adopted primarily to protect employers against "class" or "representative" actions, the very provisions petitioner relied on to oppose the joinder of additional plaintiffs in *Johnson*. Yet, in the 35 years petitioner claims its age 60 mandatory retirement policy has been in force, and despite the fact that aggrieved employees have had the right to file their own actions, this case is only the second employee action to challenge forced retirement. Petitioner's claim that it has been "harass[ed] from successive and repetitive challenges" (Pet. 25) has no basis in fact.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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